Supreme Court, U.S.
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No. 98-78

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CITY AND COUNTY OF HONOLULU,
Cross-Petitioners,

v.

SMALL LANDOWNERS OF OAHU, and RICHARD S. H. WONG, OSWALD K. STENDER, MARION M. L. LINDSEY, GERARD A. JERVIS, and HENRY H. PETERS, in their capacities as Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate,
Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO THE CONDITIONAL CROSS-PETITION

C. MICHAEL HARE
GAIL M. TAMASHIRO
CADES SCHUTTE FLEMING & WRIGHT
1000 Bishop Street
Suite 1200
Honolulu, HI 96813
(808) 521-9200

CARTER G. PHILLIPS *
BRADFORD A. BERENSON
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JAMES K. MEE
WAYNE P. NASSER
ASHFORD & WRISTON
1099 Alakea Street
14th Floor
Honolulu, HI 96813
(808) 539-0400

Counsel for Cross-Respondents

* Counsel of Record

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QUESTION PRESENTED

Whether the court of appeals and district court correctly applied an admittedly proper legal standard to the facts of this case to conclude that a local rent-control ordinance governing ground leases for condominium owners violated the Takings Clause of the Fifth Amendment because it did not substantially advance its stated goal of ensuring affordable condominium housing.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, cross-respondents state the following:

Cross-respondent Small Landowners of Oahu is a Hawaii non-profit corporation that has no corporate parents or non-wholly-owned subsidiaries. Cross-respondents Wong, Stender, Lindsey, Jervis and Peters are the Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate, a charitable trust that erects and maintains schools for the education of children, giving preference to indigents and orphans who are Native Hawaiians. Kamehameha Schools Bernice Pauahi Bishop Estate has no corporate parents. Its non-wholly-owned subsidiaries are as follows:

Montrose Land Acquisition, L.P.
Meridian Associates, L.P.
Southern Nevada Income Properties, L.P.
Sino Finance Group, L.L.C.
Unison Pacific Investment (U.S.), Ltd.
Montrose Erwin Square Investors, L.P.
Erwin Square, L.P.
Greensview Associates, L.P. I and II
CONAM Harbor Point Associates, L.P.

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CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO THE CONDITIONAL CROSS-PETITION

In their conditional cross-petition ("Cond. Pet."), the City and County of Honolulu (the "City") concede that the "Court of Appeals correctly identified the standard applicable to [cross-respondents'] challenge to Ordinance 91-96." Cond. Pet. 5. It is therefore not surprising that the City fails to identify any conflict between the court of appeals' decision and any decision of this Court or of any other court. Instead, the City argues that the court of appeals misapplied the admittedly correct legal stand-

ard to the facts when it held that City Ordinance No. 91-96 constituted an uncompensated taking that violated the Fifth and Fourteenth Amendments. Contrary to the City's fact-intensive arguments, the Court of Appeals correctly concluded that Ordinance No. 91-96 failed to substantially advance its stated goal of ensuring the affordability of condominium housing because reductions in ground-lease rents paid by condominium owners would be completely offset by increased purchase costs for ownership of condominiums with below-market, rent-controlled ground leases. In any event, the lower courts' unremarkable application of an admittedly proper legal standard to the facts of this case raises no legal issues worthy of this Court's attention. The City's inherently factbound conditional cross-petition should be denied.

COUNTERSTATEMENT OF THE CASE

1. The City's conditional cross-petition is the latest chapter in the City's effort to resurrect an earlier rent control ordinance that was struck down by a federal district court as a violation of the Takings Clause of the Fifth Amendment. See *Richardson* v. *City & County of Honolulu*, 759 F. Supp. 1477 (D. Haw. 1991) (Ezra, J.) ("*Richardson I*"). The City did not appeal that decision but instead sought to avoid it by enacting Ordinance No. 91-96, the equally flawed rent-control scheme at issue in this case. See Cond. Pet. App. A1-A30 (setting forth the text of Ordinance No. 91-96). Both the district court, Pet. App. 65a, and the court of appeals, Pet. App. 31a, held that Ordinance No. 91-96 also violated the Takings Clause of the Fifth Amendment. Since those decisions, members of the City Council have introduced yet another rent-control bill designed to remedy the acknowledged "constitutional infirmities" that plague its last two efforts. Opp. App. 2a.

2. When it enacted Ordinance No. 91-96, the City Council stated in its "Findings and Purpose" section that

this rent-control ordinance was designed to "serv[e] the public purpose of maintaining the affordability of housing for owner-occupants." Cond. Pet. App. A6. Specifically, the City Council found that a majority of the owner-occupants of condominium units on Honolulu pay rent to the owners of the land underneath their condominium units pursuant to long-term ground leases. *Id.* at A2. Many of these long-term ground leases contain provisions requiring renegotiation of the ground-lease rent after "initial fixed rent periods" of "25 to 30 years," *id.* at A3, based on the "fee simple value of the land on which the leasehold residential apartments are situated," *id.* Not surprisingly, because the "initial fixed rent[s]" were based on "prevailing market lease rents" prevalent 25 to 30 years ago, *id.* at A2, renegotiations have brought ground-lease rents that were below fair market value for many years more in line with current market conditions.

Ordinance No. 91-96 affected ground-leases in at least two significant respects. *First*, Section 1.4 of Ordinance No. 91-96 limited when and how often renegotiation of a ground-lease rent could occur by providing that the first ground-lease renegotiation "shall not be scheduled before the fifteenth year following the initial date of the lease" and that subsequent renegotiations "shall occur no more frequently than every ten years from and after the rent renegotiation date." Cond. Pet. App. A11. *Second*, Section 1.5 of Ordinance No. 91-96 created a ceiling on the maximum amount of renegotiated rent, which was determined by multiplying the "initial lease rent" by a "rent factor." Cond. Pet. App. A13.[1]

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[1] Under § 1.1 of Ordinance No. 91-96, the "Initial lease rent" was the greater of (1) the "beginning lease rent" at the effective date of the lease or (2) "the reasonable market value rent prevailing at the effective date of the apartment lease." Cond. Pet. App. A8. Under § 1.5, the "rent factor" was the "average consumer price index ('CPI') for the six-month period in which the rent renegotiation occurs divided" by the CPI at the time of the effective date of the initial lease rent. *Id.* at A13.

Ordinance No. 91-96 was also unusual in that it contained a provision that contemplated "the conveyance of condominiums subject to renegotiated leases on the underlying land." See Pet. App. 26a. Section 1.10 of Ordinance No. 91-96 stated that whenever an owner-occupant transferred his leasehold interest to another person who intended to be an owner-occupant, the below-market renegotiated rent also would apply to the new owner-occupant. Cond. Pet. App. A26. As a result, Section 1.10 of Ordinance No. 91-96 allowed a condominium owner to transfer his right to below-market rentals to a new owner and thereby to command a premium for that right in the form of a higher condominium price. See Pet. App. 62a.

3. Cross-respondents Wong, Stender, Lindsey, Jervis and Peters, as trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate ("Kamehameha Schools") brought suit challenging the constitutionality of Ordinance No. 91-96. Similarly, cross-respondent Small Landowners of Oahu ("SLO") brought a parallel suit challenging the constitutionality of Ordinance No. 91-96. Pet. App. 5a-6a.[2] In its suit, Kamehameha Schools filed a motion for summary judgment seeking to invalidate Ordinance No. 91-96 as an unconstitutional regulatory taking under the Fifth and Fourteenth Amendments.

a. The district court granted summary judgment to Kamehameha Schools, holding that Ordinance No. 91-96 constituted an uncompensated regulatory taking that violated the Fifth and Fourteenth Amendments. Pet. App. 61a, 65a. *First*, relying on this Court's decisions in *Pen-*

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[2] SLO's motion to consolidate its lawsuit with the action initiated by Kamehameha Schools was denied. Pet. App. 6a. Thereafter, once Ordinance No. 91-96 was struck down as unconstitutional by Judge Ezra in the Kamehameha Schools' action, SLO and the City stipulated to dismiss SLO's claim regarding the constitutionality of Ordinance No. 91-96 in their case. *Id.* Nonetheless, the SLO and Kamehameha Schools cases were argued and decided together by the Ninth Circuit below.

nell v. *City of San Jose*, 485 U.S. 1 (1988), and *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), Pet. App. 57a-58a, the district court noted that, in stark contrast to rent-control ordinances that had withstood constitutional challenge, "absolutely nothing in Ordinance 91-96's regulatory scheme accounts for the many unique factors . . . which may affect the value of an individual parcel of real property at the time of renegotiation." *Id.* at 58a. As a result, the district court concluded that Ordinance No. 91-96 was fatally flawed because it did not guarantee "the lessor . . . a fair rate of return." *Id.* at 61a. *Second*, the district court determined that Ordinance No. 91-96 was unconstitutional because it permitted the "owner-occupant to charge a premium, in connection with the sale of a leasehold condominium with a below-market rate renegotiated lease rent, thereby operating to transfer value from the lessor to the lessee/seller." *Id.* at 65a. Relying on statements from this Court's decision in *Yee*, 503 U.S. at 530, the district court found that "the availability of the premium and the resulting transfer of wealth from the lessor to the lessee under Ordinance 91-96 violates the Taking[s] Clause." Pet. App. 65a.

b. A unanimous court of appeals affirmed. Pet. App. 3a. The court of appeals first set forth the governing legal standard which the City acknowledges is proper (Cond. Pet. 5): "A land use regulation . . . does not effect a taking if it substantially furthers a legitimate state interest and does not deny the landowner economically viable use of his land." Pet. App. 27a. The court of appeals correctly identified that the purpose underlying Ordinance No. 91-96 was "to provide renegotiated land lease rents 'which are affordable to condominium apartment owner-occupants and fair to lessors' and to 'maintain [affordable housing] for owner-occupants.'" *Id.* at 29a (quoting Ordinance No. 91-96).[3] Thereafter, the court

[3] The court of appeals also rejected the City's jurisdictional argument that Kamehameha Schools' regulatory takings claim was not ripe. Pet. App. 29a-30a.

of appeals concluded that Ordinance No. 91-96 constituted a regulatory taking because it "regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing." *Id.* at 30a. Specifically, the court of appeals explained that because Ordinance No. 91-96 lacked a "mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, . . . [i]ncumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium." *Id.* As a result, the court of appeals determined that "[t]he price of housing ultimately will remain the same," and therefore, "the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu." *Id.*[4]

4. Following the court of appeals' decision, on January 22, 1998, a Bill was introduced in the City Council "relating to condominium lease rent renegotiation." Opp. App. 1a. The Bill acknowledges that "[t]wice previously the city has used the authority to approve ordinances intended to establish fair and reasonable renegotiated lease rents for condominium apartment lessees and land lessors," *id.*, and that "[b]oth ordinances were held unconstitutional by the federal courts," *id.* at 2a. The Bill, however, concludes that the infirmities identified by the federal court decisions "are not insurmountable" and that new rent-control provisions would "address constitutional issues cited by the federal courts in rejecting two previous ordinances on the subject." *Id.* That Bill passed first reading by the Council and is now pending before the Committee on Housing. *Id.* at 10a.

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[4] Because the district court and court of appeals both held that Ordinance No. 91-96 violated the Takings Clause, neither addressed Kamehameha Schools' remaining constitutional and state law claims. Pet. App. 65a n.19; *id.* at 31a n.7.

ARGUMENT

The decision below raises no issue worthy of the Court's review with respect to Ordinance No. 91-96. The City admits that the court of appeals applied the proper legal standard to assess whether that Ordinance constituted an uncompensated regulatory taking. Cond. Pet. 5-6. Moreover, the City identifies no decision of this Court or of any other court that is in conflict with the court of appeals' decision. Although the City disputes the court of appeals' application of the unchallenged legal standard to the facts of this case, the court of appeals correctly concluded that Ordinance No. 91-96 did not "substantially advance" the governmental interest for which it was expressly enacted. Pet. App. 30a-31a. But, even if the court of appeals' application of the admittedly proper legal standard to the peculiar facts presented here were erroneous, the City's request for fact-intensive error correction is an inappropriate basis for review. See Sup. Ct. R. 10. That is especially true where, as here, members of the City Council already have taken steps to enact another rent-control ordinance designed to overcome the infirmities identified by the lower courts.

1. The City acknowledges that the "Ninth Circuit Court of Appeals correctly identified the standard applicable to [Kamehameha Schools'] challenge to Ordinance 91-96," Cond. Pet. 5: "A land use regulation . . . does not effect a taking if it substantially furthers a legitimate state interest and does not deny the landowner economically viable use of his land." Pet. App. 27a (citing *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994)). Given this concession, the City's subsequent suggestion that the "Ninth Circuit deviated from the established legal precedents," Cond. Pet. 7, is both curious and contrary to the numerous decisions from this Court setting forth precisely the same legal standard for the regulation of land use. See *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) ("As we have said on numerous

occasions, the Fifth Amendment is violated when a land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land' ") (quoting *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980)) (emphasis omitted); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (same); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (same); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926) ("substantial relation" to legitimate governmental interests); cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 534-38 (1992) (declining to address whether rent-control ordinance substantially advanced a legitimate state interest).

The City's confusion on this point appears to arise from its failure to distinguish between the two prongs of the test cited by the court of appeals. Whether Ordinance No. 91-96 "preserve[d] the lessor's right to a *reasonable return on its investment*," Cond. Pet. at 6, which is the focus of the City's argumentation, is relevant only to the second prong, which asks whether the owner has been denied "economically viable use of his land." Pet. App. 27a.[5] Although the district court ruled that Ordinance No. 91-96 failed under both prongs of the relevant takings analysis, Pet. App. 61a, 65a, the court of appeals expressly reserved ruling on the "economically viable use of the land" prong because it determined that Ordinance No. 91-96 failed "to substantially further a legitimate state interest." Pet. App. 31a n.7. Thus, the bulk of the City's

[5] Moreover, the City's string citation to cases from this Court simply does not support its conclusion that the Constitution requires, "at most" that lessors receive a "*reasonable return on* [*their*] *investment.*" Cond. Pet. 6 (citing cases). Instead, the cases cited by the City either support the Ninth Circuit's analysis, *see Riverside Bayview Homes*, 474 U.S. at 126 (requiring that a land use regulation "substantially advance legitimate state interests" (internal quotation marks omitted)), or are largely irrelevant to the issues presented, *see, e.g., Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 213 (1986) (addressing constitutionality of the Multiemployer Pension Plan Amendments Act of 1980).

arguments about the court of appeals' supposed legal error are directed toward a ruling the court of appeals did not make.

In addition, the City is wrong to suggest that *Dolan* v. *Tigard* somehow lowered the level of scrutiny afforded a land-use regulation under the Takings Clause. Cond. Pet. 11. Instead, the *Dolan* Court reconfirmed the standards for assessing the constitutionality of such land-use regulations in general, 512 U.S. at 385, and then adopted a separate "rough proportionality" standard applicable to "adjudicative decision[s]" that involved permit conditions, *id.* If anything, that standard strengthened judicial review of the types of land-use restrictions at issue in that case, which are, in any event, different from those at issue here. In sum, there is no tension between the court of appeals' ruling with regard to Ordinance No. 91-96 and this Court's decision in *Dolan*.

The City fares no better in its efforts to identify a conflict between the court of appeals' decision and decisions of other lower courts. The only decision by a court of appeals discussed by the City—*Carson Harbor Village Ltd.* v. *City of Carson*, 37 F.3d 468 (9th Cir. 1994), overruled on other grounds by *WMX Techs., Inc.* v. *Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc), Cond. Pet. 9-10—is a decision by the same court of appeals that rendered the decision below, and therefore could create, at most, an intra-circuit conflict best resolved by the Ninth Circuit. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). But the *Carson* decision creates no such conflict because it expressly declined to reach the regulatory takings issues, which the plaintiff lacked standing to raise. 37 F.3d at 476-77. In any event, the *Carson* court observed, like the court of appeals in this case, that a rent control ordinance violates the Fifth Amendment if it " 'does not substantially advance legitimate state interests *or* denies an owner economically viable

use of his land.' " *Id.* at 473 (quoting *Lucas*, 505 U.S. at 1016).[6]

In short, the City has failed to identify any conflict between the decision below and the decisions of this Court or of any other court. See *Yee*, 503 U.S. at 537 (declining to review issue of whether rent-control ordinance constituted regulatory taking, in part, because "[t]he lower courts have not reached conflicting results").

2. Unable to identify any conflict among the courts, the City is left to argue that the Ninth Circuit improperly applied the correct legal standard to the peculiar features of Ordinance No. 91-96. Apart from the fact that such a determination is inappropriate for this Court's attention, see Sup. Ct. R. 10, the record reflects that the court of appeals' application of the law to the particular facts in this case was not only unexceptional but also entirely correct.

The City's claim to the contrary consists of a two-pronged attack. *First*, the City contends that the court of appeals misapplied the law by analyzing the *wrong* governmental interests. Cond. Pet. 7 ("The Ninth Circuit's analysis failed to recognize that the government has a legitimate interest in facilitating a healthy and stable housing market"). That claim is false. The court of appeals properly identified the relevant governmental interest by turning to and quoting directly from the "Findings and Purpose" section of Ordinance No. 91-96. See Pet. App.

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[6] The City quotes at length from *Carson*'s analysis of a rent-control provision which the *Carson* court concluded was constitutional under the "deferential," rational-basis standard applicable to "substantive due process challenge[s]," 37 F.3d at 472, Cond. Pet. 9-10. To pass muster under that deferential standard requires only that "a rational relationship exis[t] between the provisions and the purpose of the ordinance." 37 F.3d at 472. That analysis in no way conflicts with the court of appeals' conclusion in this case that Ordinance No. 91-96 failed to satisfy the more demanding standard applicable to challenges under the Takings Clause. *See* Pet. App. 30a.

29a. Thus, the court of appeals correctly concluded that: "The City enacted the Ordinance to provide negotiated land lease rents 'which are affordable to condominium apartment owner-occupants and fair to lessors' and to 'maintain [affordable housing] for owner occupants.'" *Id.* (quoting Ordinance No. 91-96).

Second, the City argues that the court of appeals erred by concluding that Ordinance No. 91-96 "serves *no* legitimate state interest," Cond. Pet. 7 (emphasis added), and that it "erroneously jumped to the conclusion that *no* legislative purpose could be advanced by the ordinance," *id.* at 9 (emphasis added). The court of appeals did no such thing. Rather, it properly held that Ordinance No. 91-96 effected a regulatory taking because it did not "*substantially further* its goal of creating affordable owner-occupied housing." Pet. App. 30a (emphasis added). In support of that more limited conclusion, the court of appeals relied on language from this Court's decision in *Yee*, Pet. App. 28a, and determined that the "absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium" means that "[i]ncumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium." Pet. App. 30a. As a result, the "price of housing ultimately will remain the same." *Id.* Accordingly, the court of appeals was correct in concluding that Ordinance No. 91-96 failed to "substantially advance" its stated goal of creating affordable housing.

3. Finally, even if the court of appeals had misapplied the admittedly proper legal standard—which it did not—the particularized application of the undisputed standard to Ordinance No. 91-96 does not present an issue worthy of this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Indeed, re-

evaluation of the facts by this Court would be especially unwarranted as legislation designed to regulate condominium lease rent renegotiation in a manner that members of the City Council contend will avoid the "constitutional infirmities" identified by the lower federal courts already has been introduced in the City Council. See Opp. App. 2a. As a result, not only would a narrow, fact-bound decision by this Court have little or no application nationwide, but also it might very well have no effect in the City and County of Honolulu.

CONCLUSION

For the foregoing reasons, the City's conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

C. MICHAEL HARE
GAIL M. TAMASHIRO
CADES SCHUTTE FLEMING & WRIGHT
1000 Bishop Street
Suite 1200
Honolulu, HI 96813
(808) 521-9200

JAMES K. MEE
WAYNE P. NASSER
ASHFORD & WRISTON
1099 Alakea Street
14th Floor
Honolulu, HI 96813
(808) 539-0400

CARTER G. PHILLIPS *
BRADFORD A. BERENSON
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Cross-Respondents

* Counsel of Record

August 13, 1998

APPENDICES

APPENDICES

APPENDIX A

[City Seal]

CITY COUNCIL
CITY AND COUNTY OF HONOLULU
Honolulu, Hawaii

Bill 3 (1998)

A BILL FOR AN ORDINANCE

RELATING TO CONDOMINIUM LEASE RENT RENEGOTIATION.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. The council finds that:

(1) Several leasehold condominium projects have been undergoing lease rent renegotiations involving many condominium lessee homeowners who are senior citizens on fixed incomes unable to afford the dramatically escalated lease rents and are facing a crisis due to the possible loss of their homes;

(2) Many other leasehold condominium projects in communities around Oahu will soon be subject to their first apartment lease rent renegotiations in the near future;

(3) The renegotiated lease rents should be fair and reasonable to both condominium apartment lessees and land lessors;

(4) Section 46-1.5(20), Hawaii Revised Statutes, authorizes the city to regulate the "renting, subletting, and rental conditions of property for places of abode by ordinance";

(5) Twice previously the city has used the authority to approve ordinances intended to establish fair and reasonable renegotiated lease rents for condominium apartment lessees and land lessors;

(6) Both ordinances were held unconstitutional by the federal courts;

(7) Review of the court decisions, however, reveals that the constitutional infirmities of the ordinances are not insurmountable;

(8) The state has a statute establishing the maximum renegotiated lease rent for leasehold one- and two-family lots;

(9) The statute, enacted in 1975, was held to be constitutional by a state circuit court in 1978; and

(10) An ordinance similar to the statute also should withstand a constitutional challenge as has been the case with the city's mandatory leasehold condominium conversion ordinance which is similar to the earlier state statute for mandatory conversion of leasehold single family residences.

The purpose of this ordinance is to establish provisions for the determination of the maximum allowable renegotiated lease rent for a condominium apartment of an owner-occupant. This ordinance is based on the state statute establishing the maximum renegotiated lease rent for leasehold one- and two-family lots. This ordinance also includes provisions intended to address constitutional issues cited by the federal courts in rejecting two previous ordinances on the subject.

SECTION 2. The Revised Ordinances of Honolulu 1990 is amended by adding a new Chapter to be appropriately designated and to read as follows:

"CHAPTER ——
MAXIMUM CONDOMINIUM RENEGOTIATED LEASE RENT

Sec. —-1.1 Definitions.

For the purpose of this chapter:

"Apartment" means the same as defined under HRS Chapter 514A.

"Apartment lease" means an apartment owner-occupant's lease to the apartment. The term includes a lease of an interest in the condominium project land upon which the apartment is situated.

"Apartment owner" means a person or the persons jointly or in common holding a leasehold interest in a residential apartment.

"Apartment owner-occupant" means an apartment owner who on the renegotiation date of the apartment lease occupies the apartment. An apartment owner shall be deemed to occupy an apartment if, on the renegotiation date, the apartment is the principal place of residence and under the possessory control of the apartment owner.

"Condominium project" means a building within a condominium property regime.

"Condominium project land" means the land on which a condominium project is situated.

"Department" means the department of housing and community development.

"Land owner" means the person holding a leased fee interest in condominium project land.

"Lease" means a lease or sublease, including any sandwich lease, affecting a residential apartment. A "sandwich lease" means any sublease in the chain of title between the land owner's interest in the land and the apartment lease.

"Lease rent" means the rent payable by an apartment owner-occupant to a lessor for the leasehold interest in a residential apartment.

"Lessee" means any person to whom an interest in condominium project land is leased or subleased.

"Lessor" means any person who leases or subleases an interest in condominium project land to another person.

"Offsite improvements" of a condominium project mean all physical improvements:

(1) Which are constructed or placed off the condominium project land; and

(2) Which are to be used in common by occupants of all lands adjoining the improvements or by occupants of all lands for whose benefit the improvements have been constructed or placed.

"Onsite improvements" of a condominium project mean all physical improvements;

(1) Which are constructed or placed on the condominium project land; and

(2) Which are for the benefit of apartment owners and other lessees in the condominium project.

"Onsite improvements" include, but are not limited to, dwelling units, garages, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

"Renegotiated lease rent" means the annual lease rent determined for each renegotiation date applicable to an apartment lease.

"Renegotiation date" means the date on which a renegotiated lease rent is to take effect.

"Residential apartment" means an apartment located in a condominium project and used for residential purposes. The term does not include the following:

(1) An apartment used for commercial purposes;

(2) An apartment used as a time share unit or transient vacation unit, as defined under Chapter 21, Article 9; or

(3) Any parking, recreational, or other nonresidential condominium apartment.

Sec. — -1.2 Applicability of chapter.

(a) This chapter:

(1) Applies to every apartment lease of a residential apartment of an apartment owner-occupant that contains provisions for the renegotiation of lease rent. This chapter shall apply whether the apartment lease was executed before July 1, 1998 or after June 30, 1998. This chapter also shall apply to lease rent renegotiations that are concluded after July 1, 1998; and

(2) Sets a maximum allowable renegotiated lease rent for the residential apartment of an owner-occupant.

(b) This chapter shall not be construed as setting a maximum lease rent for a residential apartment that is not owned by an apartment owner-occupant.

This chapter also shall not be construed as requiring the renegotiation of a lease rent which was renegotiated before July 1, 1998.

Sec. — -1.3 Renegotiation provisions.

(a) Every apartment lease shall include or be deemed to include the following provisions:

(1) Renegotiation of lease rent shall not occur more frequently than every 15 years after each renegotiation date; provided that the first renegotiation shall not be scheduled before the 15th year following the initial date of the lease; and

(2) After any renegotiation, the renegotiated lease rent for the apartment lease shall not exceed the maximum allowable under subsection (b).

(b) On a renegotiation date, the renegotiated lease rent payable for an apartment lease to a residential

apartment in a condominium project shall not exceed the dollar amount derived as follows:

(1) First, by multiplying the land owner's basis by four percent; and

(2) Then, by multiplying the result of subdivision (1) by the common interest appertaining to the residential apartment. The result of this subdivision shall be the maximum allowable annual lease rent payable for the apartment lease until the next renegotiation date.

(c) For the purpose of this section, "land owner's basis" means the fair market value of the condominium project land, valued on the applicable renegotiation date as if the fee title in the land was unencumbered, and excluding the following:

(1) The value of onsite improvements; and

(2) If applicable, the relevant apartment owner-occupant's share of the sum of the following:

(A) The current replacement cost of existing offsite improvements, attributable to the condominium project, which were paid for or contributed by apartment owners; and

(B) Overhead and profit not exceeding 20 percent of that cost.

(d) In the event the parties to a lease are unable to agree on a renegotiated lease rent, the mandatory arbitration provisions of HRS Section 516D-12 shall apply.

Sec. —-1.4 Lessor sharing of lease rent payments.

If more than one lessor has an interest in the condominium project land, they shall share in the lease rent payments from the apartment leases in accordance with their respective interests in the condominium project land.

Notwithstanding any contrary provision in any contract or lease, a developer or other person entitled to share in the lease rent payments shall share in such payments according to the terms of any applicable agreement by those entitled, or in the absence of such agreement, pursuant to HRS Chapter 658.

Sec. —-1.5 Enforcement.

(a) Any person violating any provision of this chapter shall be subject to a civil fine not exceeding $500.00 for each violation.

(b) The department of housing and community development shall enforce this chapter. Any person may request the department to investigate any alleged violation of this chapter. Or, the department on its own initiative may investigate any alleged violation.

(c) Upon receipt of a written request by a person to investigate an alleged violation of this chapter or upon its own initiative, the department shall conduct an investigation. If finding that a violation has occurred, the department shall attempt an informal correction of the violation. If the violation cannot be informally corrected or if the person requesting the investigation or the alleged violator requests an agency hearing, the department shall:

(1) Hold an agency hearing in accordance with the contested case procedures of HRS Chapter 91; and

(2) Issue an appropriate decision and order. If finding that a violation has occurred, the department may order the violator to do any or all of the following:

(A) Cease and desist from the violation;

(B) Correct the violation;

(C) Pay to a lessor or lessee any amount due and owing as specified in this chapter. An "amount due and owing" includes excessive lease rent paid by an apartment owner-occupant or insufficient lease rent paid to a lessor; or

(D) Pay the civil fine imposed under subsection (a).

(d) The department may institute a civil action in any court of competent jurisdiction for the enforcement of any decision and order issued pursuant to this section. If finding that a violation has not occurred, whether before or after an agency hearing, the department shall so notify the alleged violator and, if any, the person who requested the investigation. The notification shall be in writing.

Sec. — -1.6 Rules.

The department of housing and community development may adopt rules necessary to implement this chapter. The rules, if any, shall be adopted in accordance with HRS Chapter 91."

SECTION 3. Chapter 39, Revised Ordinances of Honolulu 1990, is repealed.

SECTION 4. This ordinance shall take effect on July 1, 1998.

INTRODUCED BY:

/s/ Andy Mirikitani

/s/ John Henry Felix
Councilmembers

DATE OF INTRODUCTION:

January 22, 1998
Honolulu, Hawaii

APPROVED AS TO FORM AND LEGALITY:

_____

Deputy Corporation Counsel

APPROVED this —— day of ——, 1998.

_____

JEREMY HARRIS, Mayor
City and County of Honolulu

APPENDIX B

Document: B3. 98 (Page 1)

DATA FOR THIS RECORD AS OF 07/24/98

Bill 3, 1998
Introduced: 01/22/98 by: ANDY MIRIKITANI
Re: CONDOMINIUM LEASE RENT RENEGOTIATION CONDOMINIUM LEASE RENT. CONDOMINIUMS. LEASE RENT. MIRIKITANI, ANDY. RENEGOTIATION.
Referred to HS
File Name: B3.98X

Title:

A BILL FOR AN ORDINANCE RELATING TO CONDOMINIUM LEASE RENT RENEGOTIATION.

Gist:

To establish provisions for the determination of the maximum allowable renegotiated lease rent for a condominium apartment of an owner-occupant.

Comments:

Bill referred to the Human Services Committee (previously Housing Committee). (CC-234 dated 5/27/98)

Bill History:

01/28/98 COUNCIL 1ST
Bill passed First Reading and referred to the Committee on Housing.

BAINUM, DUKE	Y
DESOTO, JOHN	N
FELIX, JOHN HENRY	Y
HANNEMANN, MUFI	Y

HOLMES, STEVE	Y
KIM, DONNA MERCADO	Y
MANSHO, RENE	Y
MIRIKITANI, ANDY	Y
YOSHIMURA, JON	Y

Related Communications:

CC 32, 1998 by: JOHN DESOTO, CHAIR
Reminding T. Phyllis Zerbe of Councilmember Felix's request for a list of property owners who comprise the Small Landowners Association and the number of units per property owner.

M 128, 1998 by: ROCHELLE ARQUETTE
KAMEHAMEHA SCHOOLS/BISHOP ESTATE
Opposing Bill 3 as an unconstitutional rent control proposal.

M 131, 1998 by: T. PHYLLIS ZERBE
SMALL LANDOWNERS ASSOCIATION
Opposing Bill and all similar proposed legislation.

M 133, 1998 by: T. PHYLLIS K. ZERBE
Opposing Bill.

M 253, 1998 by: JAMES K. MEE
Informing Council that the statement that a similar state statute was held constitutional is wrong because the lower court decision referred to was vacated by the Hawaii Supreme Court.